2008

Alan V. Pitt v. Alice M. Taron and Robert Taron, Sherri Kuester and Ralph Brown, Lowell D. Shields and Janice C. Shields, Ray H. Dewsnup and Rebekah Dewsnup : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
STATE OF UTAH

ALAN V PITT
Plaintiff and Appellant,
Vs.
ALICE M. TARON AND ROBERT TARON, SHERRI KUESTER AND RALPH B ROWN, LOWELL D. SHIELDS AND JANICE C. SHIELDS, RAY H. DEWSNUP AND REBEKAH DEWSNUP AND ALL PERSONS UNKNOWN CLAIMING ANY INTERREST
Defendants and Appellees

Appellate Court No. 20080380-CA

Trial Court No. 060300772

BRIEF OF APPELLEES

The Appellees, through counsel, respond to the Brief of Appellant in this briefas follows. As the Appellant has noted, this appeal involves Mr. Alan v. Pitt, the Plaintiff and Appellant, and Robert Taron, Ray H. Deswnsup and Sally A. Dewsnup, the Defendants and Appellees. The Defendants at trial who are not involved in this appeal include Ms. Sherri Kuester, Ralph Brown, Lowell D. Shields, Janice C. Shields, Larry Dewsnup, Rebekah Dewsnup, and all Persons Unknown Claiming any Interest.

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LIST OF ALL PARTIES INVOLVED IN THIS APPEAL

ALAN V. PITT, PLAINTIFF AND APELLANT.

ROBERT TARON, DEFENDANT AND APELLEE

RAY H. DEWSNUP, DEFENDANT AND APELLEE

SALLY A. DEWSNUP, DEFENDANT AND APELLEE

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78A-3-102 and Utah Code Ann. § 78A-3-103. The Utah Supreme Court, through Order dated May 6, 2008, has transferred this matter from the Utah Supreme Court to the Utah Court of Appeals for disposition pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure as of May 26, 2008.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

STANDARD OF REVIEW:

The Plaintiff has set out a *clearly erroneous standard* for the appellate court review of trial court findings of fact citing *Orton v. Carter*, 970 P. 2d 1254, 1256, Utah, 1998, quoting *State v. Irizarry*, 945 P. 2d 676, 678 (Utah, 1997). The Plaintiff has set forth a standard of *no deference* for an appellate court's review of a trial court's conclusion of law. Defendants Taron and Dewsnups concur with these standards for review set forth by the Plaintiff, Alan Pitt.

DEFENDANT'S STATEMENT OF CASE TO INCLUDE RELEVANT FACTS

1. Defendant Robert Taron is an adjoining landowner to Mr. Alan Pitt on the western boundary of the Pitt property (Parcel No. 31738).
2. Defendants Ray and Sally Dewsnup own Parcels No. 31751 and 31740 and they are adjoining landowners to Mr. Pitt on the eastern boundary of the Pitt property (Parcel No. 31738).
3. Some fences have been in place between the properties of Mr. Alan Pitt and Robert Taron and Ray and Sally Dewsnup for different periods of time.
4. Livestock have been present on the Pitt property for a period of years.
5. Fences that have been erected by the parties have not been placed as boundaries by agreement or on the basis of accurate surveys of the true property line. The fences were an attempt to contain livestock to include sheep.
6. Mr. Alan Pitt and Mr. Taron erected a fence for the purpose of a barrier to control livestock in the early 1990's.
7. A prior adjoining landowner on the eastern boundary of the Pitt property, Lowell Shields, father to Sally Dewsnup, was placing a fence on his boundary line and halted, for a period of time, due to the request of Mr. Alan Pitt's father.
8. At trial, the Plaintiff failed to meet the necessary elements of boundary by acquiescence for Defendants, Robert Taron, Ray and Sally Dewsnup. The

Plaintiff further failed to meet the necessary elements of prescriptive easement against the Defendants Ray and Sally Dewsnup.

9. The Plaintiff was successful in a boundary by acquiescence claim against Ralph Brown as well as being successful on a contract claim against Lowell D. Shields.

10. This appeal by the Appellant followed against Defendants and Appellees Robert Taron, Ray and Sally Dewsnup.

SUMMARY OF ARGUMENT/RESPONSE TO PLAINTIFF'S ARGUMENTS

The Plaintiff, Alan Pitt, has requested the Court of Appeals to review four issues from the District Court trial. The Defendants, Robert Taron and Ray and Sally Dewsnup, respond to these arguments and positions with the following analysis of each issue, argument, and the related language of the trial court decision and rationale.

ISSUE ONE AS STATED BY THE PLAINTIFF

Did the trial court abuse its discretion and enter findings that were clearly erroneous when it entered a ruling against the Plaintiff concerning his claim to own the lands to his west and to his east via the doctrine of boundary by acquiescence, when the court disregarded photographic evidence and concentrated almost

exclusively upon conflicting testimony about the existence of fence lines to establish the boundary between properties and the long term acquiescence of the adjacent land owners to said boundaries?

POSITIONS TAKEN BY THE PLAINTIFF ALAN PITT

Plaintiff argues, in his appeal to this Court, that the trial court abused its discretion when it, in his opinion, disregarded "unchallenged testimony" and "volumes of undisputed photographic evidence supporting claims of ownership and easement" and "apparently ignored all of the photographic evidence", the Court considered the testimony of the Defendant Taron's several witnesses when it ruled that it had not been demonstrated by a preponderance of the evidence that the landowners occupied the land up to a visible line for a completed period of 20 years".[1] Mr. Alan Pitt maintains that the court did not mention any of the testimony given by Johnny Pitt and the court did not specifically refer to any of the "many photographic exhibits" from the 1950's through the 1970's that, in the view of the Plaintiff, had been "described in detail during their testimony".[2] Pitt argues that the Judge erred in not giving more weight to the testimony of Johnny,

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[1] Brief of Appellant, *Pitt v. Robert Taron and Ray and Sally Dewsnup*, hereinafter referred to as Brief of Appellant, at 5.

[2] Brief of Appellant, at 5; Tr. at 367, lines 14-17.

Craig, and Alan Pitt. He argues that the Trial Judge gave too much weight to the testimony of Holly Shields and Sharon Caldwell.[3]

PLAINTIFF'S BURDEN OF PROOF

Plaintiff, Alan Pitt, was required to prove his claim of boundary by acquiescence, by a preponderance of the evidence through each of the following elements. First, he was required to show that the parties occupied up to a visible line marked by monuments, fences or buildings. Second, Mr. Pitt was required to show that the parties have mutually acquiesced to the line as a boundary. Third. Mr. Pitt was required to show that the parties mutually acquiesced in this boundary line for a period of at least 20 years. Fourth, Mr. Pitt must establish that the Parties are adjoining landowners.[4] In his decision, Judge Kouris addressed the specific land at issue and the Plaintiff's burden of proof. The Judge ruled as follows on this point:

> Issue No.1: The border on the west side of the Pitt property which is PARCEL 31723 - adjacent to the border on the west side of the Pitt property and adjacent to the border on the east side of the Taron property, Parcel No. 31738. Pitt claims the property west of the property line and east of the fence line on a theory of boundary by acquiescence.
> To prevail, Pitt must prove, (1) that the parties occupied up to a visible line marked by monuments, fences or buildings; (2) parties have mutually acquiesced to the line as a boundary; (3) this happened for 20 years, and (4)

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3 Brief of Appellant, at 29-31.

4 Trial Transcript (hereafter cited as Tr.) at 365, Lines 3-10.

they are adjoining landowners.[5]

With conflicting evidence in the record, the Judge recorded his findings of fact.[6] It is clear that the Court did take the evidence into account in coming to its findings. The Trial Court cites photographs, exhibits and witness testimony in his decision.

PLAINTIFF'S POSITION THAT THE COURT IGNORED PLAINTIFF'S PHOTOGRAPHS AND PLAINTIFF'S WITNESSES

The Trial Judge Ruled on the issue of *a visible line marked by monuments, fences or buildings for a period of 20 years*:

> There was significant evidence presented on this point. The plaintiff presented numerous photographs at different periods of time. As well, the plaintiff provided witnesses who saw fence line markings a large number of times. Craig and Alan Pitt both testified that they remembered a fence when they were young kids, different portions. [7]

Defendants Taron and Dewsnups submit that this specific language of the Trial Judge's Decision does not support the position of the Plaintiff, that the judge ignored his photographic evidence. As noted in the next section, the Trial Judge balanced the photographic evidence of the Plaintiff with other conflicting evidence

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5 Tr. at 365, Lines 13 – 25, 367, 368, Lines 1 – 11.

6 Tr. at 365, Lines 13 – 25, 367, 368, Lines 1 – 11.

7 Tr. at 365, Lines 13-18.

in the record, including the testimony of both Plaintiff and Defense witnesses and photographs entered by the Defendants. It further does not support the notion that the Trial Court did not consider testimony of the Plaintiff's Witnesses as Craig and Allan Pitt were both specifically named in the Judges Ruling.[8]

PLAINTIFF'S CLAIM OF BOUNDARY BY ACQUIESCENCE BETWEENTHE EASTERN BORDER OF THE PITT PROPERTY AND ADJOINING LAND OF DEFENDANT ROBERT TARON

The specific language of the Trial Judge's decision appears in conflict with the position of Plaintiff, Alan Pitt, that the Court considered only the testimony of the Defendant's several witnesses to form its Ruling. It is submitted that the fact that a judge, presiding over a trial, makes a decision regarding which testimony to give the greatest weight to, is part of his or her duties as a trier of fact, especially when faced with substantial conflicting evidence.[9]

Judge Kouris ruled on the record, regarding the balancing of the evidence he considered on this issue:

> As well, the plaintiff provided witnesses who saw fence line markings a large number of times. Craig and Alan Pitt both testified that they remembered a fence when they were young kids, different portions.

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[8] Tr. At 365, Lines 13-18.

[9] *Ottman v. Baldwin*, 164 P. 3d 450, (Utah Ct. App. 2007); *Saleh v. Farmers Ins. Exch.* 133 P. 2d 428, (Utah, 2006); *Lunt v. Lance*, Case No. 20070014-CA, Court of Appeals of Utah, May 30, 2008.

> Defendant presented witnesses who saw a fence being in place and not in place throughout the period in question. Ms. Vicki Hildebrand lived across the street from this land for 20 years. She saw animals roaming freely from the Pitts to the Taron's land and back. Occasionally she would walk out into this field and never saw a permanent fence. When she moved in 1989 she did not see a fence separating the property at that time. Holly Shields testified that she grew up on the property and can only remember open fields with no permanent fences or markers. She further testified that when the fences were put up they were constantly moving back and forth with no permanent placement trying to move water lines and accommodating sheep. Sharon Coldwell said since the late 70s the fence was a movable string of pallets. She routinely sees sheep wandering back and forth. Mr. Mike Taron testified that there never was a permanent fence but only pallets and chunk of wood unsuccessfully trying to contain the livestock.
>
> He was actually employed at one time to keep the sheep out of the ditches and to prevent them from walking on the pipes, etc. He also testified of having to notify law enforcement for assistance in controlling this livestock.[10]

After setting forth the documentary and witness testimony he considered in reaching his decision, Judge Kouris commented on the record regarding the issue of a visible line marked by monuments or a fence:

> Due to this conflicting evidence during [trial] it has not been demonstrated by a preponderance of the evidence that the landowners occupied the land up to a visible line for a complete period of 20 years.[11]

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[10] Tr. at 365, Lines 15-25, 366, Lines 1-15.

[11] Tr. at 366, Lines 15-18.

Judge Kouris next addressed his findings of fact, his decision and the rationale for his decision on the issue of *mutual acquiescence by the parties on a boundary for at least twenty years*. He ruled:

> There is no evidence to show that the landowners occupied up to but never over this line to evidence acquiescence. In fact, the opposite was demonstrated. There's evidence of landowners as young children running across the fields as if it was one large field. There's evidence of livestock constantly crossing over the boundary, never demonstrating the rising [raising] of livestock only up to a line which [parties] acquiesce [acquiesced] to a boundary.[12]

Judge Kouris cited the lack of evidence in the record showing that adjoining landowners irrigated, farmed or cultivated up to a specific boundary.[13] The Trial Judge found that the purpose of the fence was not to delineate relative ownership rights in the property but to attempt to control livestock.[14]

Judge Kouris supported his factual finding on the issue of mutual acquiescence with the specific testimony of witnesses, including Holly Shields, Plaintiff Alan Pitt, and Defendant Bob Taron.[15] He noted the observation of Ms. Shields that, during her youth, temporary fences were put up and taken down

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[12] Tr. at 366, Lines 19-25, 367, Lines 1-3.

[13] Tr. at 367, Lines 5-7.

[14] Tr. at 367 Lines 7-10.

[15] Tr. at 367,Lines 12 - 25.

routinely to shear sheep[16]. The Judge listed the sworn testimony of Plaintiff Alan Pitt and his acknowledgment that, through the life of the fence, pallets and other things were used to plug holes in the fence to contain livestock.[17] The Judge referenced the testimony of Mike Taron as Taron's observation that, in 1988, he observed his father putting up part of a fence in an attempt to keep sheep off of his property.[18] Judge Kouris noted the testimony of Bob Taron and the fact that in 1968 he observed holding pens that separated the property "tossed together in a mess".[19] The Judge noted the testimony of Mr. Taron that "the panels separating the property would constantly move depending on the livestock's needs".[20] Judge Kouris noted Taron's observation that "between 1987 and 1995 "a fence was in place for about one half of the time.[21]

Judge Kouris, faced with this evidence presented by both parties at trial, concluded:

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[16] Tr. at 367, Lines 12-14.

[17] Tr. at 367, Lines 14 - 16.

[18] Tr. at 367, Lines 16-19.

[19] Tr. at 367, Lines 16-22.

[20] Tr. at 367, Lines 22-23.

[21] Tr. at 367, Lines 23-25.

> No testimony that landowners on both sides of the boundary believed, operated or discussed that the current placement of the fence line is in fact a line they accepted as a border between the properties. There is no dispute concerning the landowners [are] adjoining; therefore, the plaintiff in this matter did not show by a preponderance of the evidence [that] the statutory requirements for boundary by acquiescence have been satisfied and **for that reason** I rule in favor of the defendants in this action and the claims set out in Paragraph 5 of the complaint is denied.[22]

Defendant Taron submits that the sworn testimony of Plaintiff Alan Pitt supports the Judge's finding of fact that the fence was used as a barrier for livestock control and not as a mutually acquiesced boundary between the parties. Alan Pitt testified, during the trial, that Mr. Harris put up a fence on his western border. The fence had been repaired several times due to sheep sticking their heads through the fence and smashing the fence down.[23] He noted that sheep wear out a fence.[24] He agreed with the testimony of his brother, Johnnie that Harris placed the fence to keep in sheep.[25] Plaintiff Alan Pitt further testified that he doesn't "keep track of dates.[26] Pitt testified that Mr. Taron first moved onto the

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[22] Tr. at 367, Line 25, 368 through Line 9.

[23] Tr. at142, Lines 7-25.

[24] Tr. at 142, Lines 7-25.

[25] Tr. at 142, Lines 17-20.

[26] Tr. at 142, Lines 23-24.

property around 1987.[27] Alan Pitt testified that his family owned sheep in 1987.[28] He testified that his family's sheep would roam freely over onto Mr. Taron's property in those first years.[29] Plaintiff testified that Suffic sheep are very good jumpers. He noted that "They are like deer, plus . . . if they get a little hole started in the fence they get through it".[30] Alan Pitt acknowledged that his sheep would get over on the Taron land through the fence.[31] Alan Pitt testified that *corrals [were] built up along the fence line*[32] and that the Taron family called animal control regarding his sheep getting onto their property.[33] Alan Pitt and Robert Taron provided testimony that Mr. Taron helped to erect a fence around 1992 which Mr. Taron indicated was for the purpose of keeping the Pitt livestock off of his land.[34] It is clear that the Plaintiff's own testimony was used in the Court's

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[27] Tr. at 142, Lines 21-24.

[28] Tr. at 142, Line 25, 143, Line 1.

[29] Tr. at 143, Lines 10 -17.

[30] Tr. at 143, Lines 12 -15.

[31] Tr. at 143, Lines 12 -17.

[32] Tr. at 143, Lines 18-20.

[33] Tr. at 143, Lines 21-24, 144, Lines 1-2.

[34] Tr. at 144, Lines 21-24.

analysis of the case and ultimate ruling. The record shows much conflicting evidence. The fact that the Plaintiff was ultimately unsuccessful against the Defendant's Taron and Dewsnups does not mean that the Court did not consider the Plaintiff's testimony.

Defendant Taron submits that this evidence in the trial record provides further evidentiary support for the Judge's findings of fact. The trial transcript and decision of the trial judge reveal a careful consideration to many details and issues raised by both parties and the judge clearly did not ignore the weight of evidence in the trial record, in reaching his findings of fact or his conclusion on the issues on the border dispute between Plaintiff Alan Pitt and Defendant.

PLAINTIFF'S CLAIM OF BOUNDARY BY ACQUIESCENCE BETWEEN THE EASTERN BORDER OF THE PITT PROPERTY AND ADJOINING LAND OF DEFENDANTS RAY AND SALLY DEWSNUP

Judge Kouris found, in regard to the claim of boundary by acquiescence by Alan Pitt (Parcel 31723) adjoining the property of Ray Dewsnup (Parcel 3151), that "Plaintiff provided little evidence directly to this point." [35] Judge Kouris set forth the Plaintiff's burden of proof and commented on the evidence he saw in the trial record:

> "Some pictures were presented at trial but the corpus of evidence produced fails significantly short of achieving preponderance of the evidence…No

[35] Tr. at 369, Lines 15-25, 370, Lines 1-9.

> evidence to show the landowners occupied up to but never over this line to evidence acquiescence. In fact, the opposite was demonstrated. There was no evidence the landowners irrigated up to any specific line that they acquiesced to; no evidence they cultivated or [farmed] up to a specific line they acquiesced to; no testimony the landowners on both sides of the boundary believed, operated or discussed that the current placement of the fence line is in fact the line they accepted as a border between the property. Based upon the proof of a preponderance of the evidence to satisfy the claim of boundary by acquiescence, this Court rules in favor of the defendant and the claim in paragraph 9 of the complaint fails.[36]

ARGUMENT AND LAW IN SUPPORT

Plaintiffs Taron and Dewsnups maintain that Plaintiff has identified no legal issues which the Trial Judge made an error in reaching his decision. Taron submits that the elements of proof cited by Judge Kouris, regarding a boundary by acquiescence, are in accord with recognized precedent in this state.[37] The ruling of Judge Kouris that Plaintiff, Alan Pitt, needed to demonstrate a permanent boundary is supported by Utah case law requiring a definite and certain property line, with the physical properties of visibility, permanence, stability, and a definite location.[38]

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[36] Tr. at 369, Lines 15-25, 370, Lines 1-9.

[37] *Homer v. Smith*, 866 P. 2d 622 (Utah, 1993), certiorari denied 878 P. 2d 1154, Englert v. Zane, 848 P. 2d 165 (Utah 1993), *Hales v. Frakes*, 600 P. 2d 556 (Utah 1979), *Jacobs v. Hafen*, 917 P. 2d 1078 (Utah 1996).

[38] *Monroe v. Harper*, 619 P. 2d 323 (Utah 1980), Gilmore v. Cummings, 904 P. 2d 703 (Utah Ct. Ap. 1995), certiorari denied 913 P. 2d 749.

The rulings of Judge Kouris that the Plaintiff needed to show that the parties mutually acquiesced in the placement of the fence as a boundary and not merely as a barrier for livestock control is in accord with case precedent of this court and the Utah Supreme Court.[39]

The fact that the Plaintiff produced pictures at trial is not in dispute. The meaning and evidentiary value of the photos was taken into account by the Trial Court. It is clear that the Trial Court found that the photos failed to prove that they indicated a true boundary line between the properties. Furthermore, the photos failed to prove mutual acquiescence by the parties.

ISSUE TWO AS STATED BY THE PLAINTIFF

Did the court make findings that were clearly erroneous when it entered a ruling against the Plaintiff concerning his claim to have perfected an easement to egress across the neighbor's land to his east via the prescriptive easement doctrine based **in part** upon testimony by the Defendant Sally Dewsnup about her mother having been fearful of the Plaintiff because of his previous drug related conviction, when the court considered the Plaintiff had a possible access over his own property

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[39] *Low v. Bonacci*, 788 P. 2d 512 (Utah 1990); *Leon v. Dansie*, 639 P. 2d 730 (Utah 1981), *Grayson v. Roper Ltd. Partnership v. Finlinson*, 782 P. 2d 467(Utah 1989); *Hales v. Frakes*, 600 P. 2d 556 (Utah 1979),(Utah 1979); *Wilkinson Family Farm v. Babcock*, 993 P. 2d 229, (Utah Ct. App. 1999); *Anderson v. Osguthorpe*, 504 P. 2d 1000 (Utah 1972).

after overruling repeated objections on the issue, and when the court considered the Plaintiff had a possible access over his own property after overruling repeated objections on the issue, and when the court stated that the Plaintiff had lost whatever claim to the easement he may have had when he was incarcerated for a period of one year beginning in 2003 due to a drug related offence [offense].

POSITIONS TAKEN BY PLAINTIFF PITT

Plaintiff raises a number of issues within Issue Two. First, he contends that the trial became "personalized" when his motive in acquiring more land and he was cross examined regarding his prior criminal record.[40] Second, the Plaintiff Pitt contends that his prior felony conviction was never used to try to impeach "the witness' veracity", but rather [it] was used to vilify him...".[41] Third, Pitt cites his disagreement with the reference of an incident involving a fire bomb of Mr. Pitt's car, directly adjacent to the home of Margaret Shields.[42] Fourth, the Plaintiff has cited his disagreement with cross examination and direct testimony of Sally Dewsnup regarding the intimidation of her mother, Margaret Shields, by the acts of Mr. Alan Pitt.[43] Fifth, the Plaintiff maintains that the trial court questions and

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[40] Brief of Appellant, at 10.

[41] Brief of Appellant, at 11.

[42] Brief of Appellant, at 11.

[43] Brief of Appellant, at 11.

statements during closing arguments referred to fear Margaret Shields, the mother of Defendant Sally Dewsnup, toward Alan Pitt. Even though witness Sally Dewsnup testified that her mother was afraid of Alan Pitt, Plaintiff argues that these personal attacks against the Plaintiff had an improper and great impact upon the court's ultimate ruling concerning property rights.[44] Sixth, Plaintiff objects to the Trial Court asking a question regarding how far a neighbor had to go to show the neighbor's objection to the Plaintiff's repeated acts of traveling on the Defendant's land.[45]

PLAINTIFF'S BURDEN OF PROOF

Defendants Ray and Sally Dewsnup take the position that the Plaintiff must establish prescriptive easement by clear and convincing evidence.[46] To establish a prescriptive easement in the adjoining Dewsnup property, Mr. Pitt must establish that his use of the property was open, notorious, adverse and continuous use for a period of twenty years.[47]

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[44] Brief of Appellant, at 11.

[45] Brief of Appellant, at 11.

[46] *Lunt v. Lance*, Case No. 20070014-CA, Court of Appeals of Utah, May 30, 2008; *In re R.R. D.* 791 P. 2d 206, 208 (Utah Ct. App. 1990).

[47] *Crane v. Crane*, 683 P. 2d 1062 (Utah, 1984), *Jensen v. Brown*, 639 P. 2d 150 (Utah 1981), *Valcarce v. Fitzgerald*, 981 P. 2d 305 (Utah 1998); *Savage v. Nielsen*, 197 P. 2d 117 (Utah, 1948).

FINDINGS AND DECISION OF COURT ON PRESCRIPTIVE EASEMENT CLAIM OF MR. PITT

The Trial Judge identified the easement claim for the "south portion of the eastern border of the Pitt property, Parcel No. 31723 which abuts the western border of the Dewsnup property, Parcel No. 31740. Judge Kouris noted that the record showed that "Pitt has routinely used a portion of this property to ingress and egress from his property located behind his home".[48] The Court observed the claim of prescriptive easement of Mr. Pitt along the Dewsnup property brought so Mr. Pitt "can continue to use the property to access the back of his property".[49] The Court set out the elements of proof to include: 1) that the use of the Dewsnup's land was open 2) continuous and 3) adverse under a claim of right 4) for a period of 20 years[50].

In regard to Plaintiff Pitt's burden to establish that he had used the property continuous for a period of twenty years, Judge Kouris noted for the record:

> There was evidence that Mr. Alan Pitt was incarcerated for different periods throughout his life, the longest period being one full year. He and his mother since 1998 are the only two on the deed to the property and he was in prison from the period of 2003 to 2004. No credible evidence received that anyone used this property or the proposed easement at that

[48] Tr. at 370, Lines 13-15.

[49] Tr. at 370, Lines 15-18.

[50] Tr. at 370, Lines 18-21.

> time was produced. Further, there was no evidence supporting an unbroken chain of use for the last 20 years.[51]

Judge Kouris noted the nature of the use between the parties. He observed for the record:

> the purpose of the law is to assure peace and good order of our society by leaving the long term status quo at rest. To do this the claimant must prove that he used the property peacefully without interference for the last 20 years. This has not been proven. In fact, the use of the property has been in dispute for this entire time.[52]

The Trial Judge noted evidence from the Plaintiff's case that raised the issue of the permissive use of the Dewsnup property. He observed:

> There's also ample evidence of use by permission which defeats the prescriptive easement claim. Craig Pitt testified that he remembered an agreement the parties had that would allow the Pitts to drive through the Shield's yard, Sally Dewsnup also testified that Alan Pitt informed her he had an agreement with her mother to allow passage through the land. Alan Pitt testified that in the 60s his family tried to trade the northeast sliver of land easement. That deal fell apart but the Pitt family still uses the property inferring the Shields allowed this to continue. Alan Pitt testified that it was possible that his father had an agreement with the Shield's father to allow passage through the land. Sometime in the '70s, Mr. Shields began to erect a fence that would eliminate access to the proposed easement. Mr. Pitt met with him and convinced him not to do it, allowing him to continue to use the easement. Larry Dewsnup testified that Alan Pitt himself told him that Pitt believed that Margaret Shields granted him permission to drive across the land. Rebecca Dewsnup witnessed Pitt telling Sally that he couldn't believe she wouldn't honor her father's agreement to allow him to drive through the property.[53]

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[51] Tr. at 370, Lines 22-25-371, Lines 1-5.

[52] Tr. at 371, Lines 6-11.

[53] Tr. at 371, Lines 12-25-372, Lines 1-9.

Based upon the record, Judge Kouris noted the effect that granting a prescriptive easement would have on the parties:

> This easement claim would effectively deprive fundamental rights of the Dewsnups that they are due as property owners. Having vehicles driving a few feet from a person's home where the homeowner can actually hear the rumbling in the ground, is not the best use for a house. Being afraid to allow grandchildren to run freely inside of your yard is clear interference with landowner's rights. Not being able to landscape one's yard, to eliminate mud and provide privacy in one's own yard is a violation of one's property rights. Having to worry about traffic across the property potentially damaging her utilities is something that landowner shouldn't have to deal with.[54]
>
> This also touches on some serious public policy issues. If you are asked to stay off of somebody's property and you continue to trespass, the law cannot reward this behavior that is contrary to keeping the peace. Sally Dewsnup testified that she's asked Alan Pitt several times to quit driving on her property. As well, her mother asked the Pitts to move their vehicle off the property several times. They would and then move them back onto it. She also testified that the Pitt's parents and they always refused. Sally also encouraged her mother to fence in the property but her mother would not because of Alan's criminal background and she felt intimidated. In 2005 Alan Pitt signed a contract with Lowell Shields in an attempt to squeeze Dewsnup into selling him this land in question. Again, this attempt failed and Pitt knew the Dewsnups did not want him using the property.[55]

Judge Kouris examined the witness testimony in the record regarding the use of the Dewsnup property by Alan Pitt and his family related to different incidents related to knowledge of opposition to the use of the property by Alan Pitt. The

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[54] Tr. at 372, Lines 10-21.

[55] Tr. at 372, Lines 22-25-373 Lines 1-13.

Judge noted:

> Another instance, Pitt attempted to layout a garage that extended across the proposed easement and Margaret Shields stopped it. Another communicated instance where the Shields indicated they were not going to allow passage across their property; sometime in the 1990s Alan Pitt attempted to purchase the property from Margaret Shields again and again was denied.
>
> When the Dewsnups built their new existing home, they did with no regard to an easement, further proof of their non-acceptance of the pathway. Rebecca Dewsnup testified that she saw Sally ask Pitt not to drive across [56]

The Trial Judge found that Defendants Ray and Sally Dewsup would not "be afforded the full benefit of home and property owner with the existence of this easement".[57] The Judge noted, from the sworn testimony, that Plaintiff Alan Pitt had admitted that "the back portion of his property is accessible through his driveway; however, he feels that would be inconvenient."[58] The Court concluded that the property rights of Defendants Ray and Sally Dewsnup outweigh the convenience cited by Plaintiff Alan Pitt.[59] Based on this review of evidence that the parties introduced at trial, the Court found that "a prescriptive easement does not exist across the Dewsnup property and the claim set out in Paragraph 18 of the

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[56] Tr. 373 Lines14-25.

[57] Tr. 374 Lines 7-9.

[58] Tr. at 374, Lines 9-12.

[59] Tr. at 374, Lines 12-13.

paragraph fails".[60]

The fact that motives were explored in a case highly fact dependant upon action or inaction was necessary and helpful to the Defendants' Defense. The Court did not error by allowing evidence on this topic.

PLAINTIFF'S POSITION THAT THE TRIAL BECAME PERSONALIZED"WHEN HIS MOTIVE IN AQUIRING MORE LAND AND HIS PRIOR CRIMINAL RECORD WERE EXAMINED

Mr. Pitt argues that the trial became "personalized" when his motive in acquiring more land and he was cross examined regarding his prior criminal record.[61]

The fact that the Plaintiff was absent from the property for numerous periods of time is critical to the Defendant's defense of the Plaintiff's claim of prescriptive easement. The effect would have been similar if the Plaintiff was away on a religious mission and not using the property at that time. It may be embarrassing for the Defendant to admit to past wrongdoings however by bringing this action and alleging that all the elements had been met, when in fact they were not, the Defendants had a right to expose the elements the Plaintiff was lacking in his claim.

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[60] Tr. at 374, Lines 15-17.

[61] Brief of Appellant, at 10.

THE MOTIVE OF MR. PITT'S LAWSUIT AGAINST ALL OF HIS ADJOINING NEIGHBORS

Whether or not Plaintiff Alan Pitt was able to successfully demonstrate sufficient evidence to meet his burden of proof for his boundary by acquiescence cases and his prescriptive easement case, it is noteworthy that this litigation was not a dispute regarding one isolated boundary dispute between two neighbors. Mr. Pitt was suing every single neighbor that bordered him. Mr. Pitt acknowledged during cross examination that, through his lawsuit against every adjoining neighbor, he was seeking some of each of his neighbor's land or money.[62]

Of course, when the Court is faced with substantial conflicting evidence, the credibility of every party to the action is at issue, including the testimony of Plaintiff Pitt on the reason of why he brought the lawsuits against all of his surrounding neighbors attempting to take their land or money.[63] The Court did not error if it did assess the Plaintiff's credibility and possible motives in bringing this action.

EXAMINATION OF PRIOR CRIMINAL RECORD

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62 Tr. p. 140, Lines 20-23.

[63] Utah Rules of Evidence, Rule 104(e) Weight and Credibility.

Mr. Pitt objects, in his brief, to being questioned about his prior criminal convictions.[64] Defendants Ray and Sally Dewsnup submit that the absence of Alan Pitt, during the period of time he claimed to establish a prescriptive easement was a fact directly related to Plaintiff's duty to establish that his use had been "continuous" for a period of at least twenty years.[65] This was a necessary element of Plaintiff's prima facia case. Although certain criminal convictions can be introduced to impeach a witness,[66] Defendants Sally and Ray Dewsnup submit that the primary purpose for questions related to convictions were relevant to confinements in facilities which prevented Mr. Pitt's use of the Dewsnup property during certain years. This exposed the absence of a key element to the Plaintiff's case as his purported use was not "continuous". It is submitted that the responses which the Plaintiff chose to give regarding his absences from his home, during the time periods in question for the claimed easement, affected the further follow up

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[64] Appellant's Brief, p. 10.

[65] *Homer v. Smith*, 866 P. 2d 622 (Utah, 1993); *Crane v. Crane*, 683 P. 2d 1062, 1064 (Utah 1984); *Jensen v. Brown*, 639 P. 2d 150, 152 (Utah 1981); *Savage v. Nielsen,* 114 Utah 22, 197 P. 2d 117, 122 (1948).

[66] Utah Rules of Evidence, Rule 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME, providing for attacking the credibility of a witness with "Evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted". Rule 609 (a) (1).

questions requesting greater clarity of his whereabouts and absences from the property. For example, the Plaintiff responded with the following answers to questioning regarding his location throughout the past twenty years:

> [Cross examination by Defendant's counsel]
> Q: And since '85 have you resided at that property consistently or were there any periods of time where you had another address?
> A: No, that's been my address.
> Q: There were no chunks of time where you were absent from the property after 1985?
> A No other than leaving town to go up for work, you know, just going to a job until I got it done and then I'd come back.
> Q And how often would that be?
> A During the summer months from, you know, longest would be 10 days, usually from four to 10 days.
> Q And how often would that be?
> A During the summer months from, you know, longest would be 10 days, usually from four to 10 days.[67]

Plaintiff Pitt, after a number of follow-up questions acknowledged he that was absent from the property during 2003 and 2004 due to imprisonment on the basis of a criminal conviction. He acknowledged that he had also been convicted of other crimes [68] and he had a jail sentence he believed to be 30 days during the early 1990's.[69] Mr. Alan Pitt finally acknowledged the obvious fact that during the

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[67] Tr. at 139, Lines 1-12-140, Lines 1-12.

[68] Tr. at 139, Lines 1-12-140, Lines 1-12.

[69] Tr. at 140, Lines 7 – 12.

periods of time he was incarcerated, he was not driving over the Dewsnups' land. [70] The Defendants maintain that the fact that the Plaintiff's absence from the property for reasons of a criminal conviction may be embarrassing or unfortunate for Mr. Pitt to explain does not immunize the Plaintiff from this line of questioning after giving incomplete responses to previous questions regarding his whereabouts. The Plaintiff ultimately admitted to his criminal background and it is noteworthy that his counsel did not object during the questioning of him regarding this matter.[71]

At trail, Alan Pitt testified as to why he wanted to drive over the Dewsnup property. He testified that he and his brother, Craig were the individuals who primarily cut across the Shields and later the Dewsnup property. He noted that Craig had sheep in the Pitt family backyard.[72] In addition, Plaintiff Pitt introduced a photo showing his family riding four wheeler vehicles on the Dewsnup property for which the prescriptive easement was claimed.[73]

Plaintiffs Ray and Sally Dewsnup contend that, based on the evidence which Plaintiff Pitt presented at trial, even if he were to establish that he met the elements of a prescriptive easement, which he failed to do, he had an easement in gross, with

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[70] Tr. at 162, Lines 24-25-163 at Lines 1- 2.

[71] Tr. at 139, Lines 13-25-140 at Lines 1-12.

[72] Tr. at 151, Lines 10-13.

[73] Tr. at 88, Lines 14-25.

a personal, noncommercial interest.[74] In view of this type of easement, even if he would have established that all the elements of a prescriptive easement were present at trial, his interest was nontransferable.[75] The time he was confined and not available to travel across the Dewnsup land directly conflicts with Pitt's claim that he exercised a continuous presence over the Dewsnup land for the required period of time.[76]

The Defendant Dewsnups argue that the Plaintiff introduced evidence of an easement of necessity, although he sought a prescriptive easement in his pleadings. Defendants argue that to the degree Pitt maintained that he needed the passage over the Dewsnup land as a necessity, the availability of an alternate route for his "landlocked land" in the rear of the Dewsnup property was relevant.[77] In addition, Defendants argue that Plaintiff Pitt cannot legally receive credit for time toward a prescriptive easement for any time he may have had an easement by necessity.[78]

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[74] *Crane v. Crane*, 683 P. 2d 1062, (Utah, 1984).

[75] *Crane v. Crane*, 683 P. 2d 1062, (Utah, 1984).

[76] Tr. at 162, Lines 24-25-163, Lines 1- 2; *Homer v. Smith*, 866 P. 2d 622, (Utah, 1993); *Crane v. Crane*, 683 P. 2d 1062, 1064 (Utah 1984); *Jensen v. Brown*, 639 P. 2d 150, 152 (Utah 1981).

[77] *Savage v. Nielsen,* 197 P. 2d 117(Utah, 1948) Quoting 28 C.J.S., Easements, § 18, page 674.

[78] *Savage v. Nielsen,* 197 P. 2d 117(Utah, 1948)Quoting 28 C.J.S., Easements, §

THE PLAINTIFF'S POSITION THAT HIS PRIOR FELONY CONVICTION WAS NOT USED TO TRY TO IMPEACH THE WITNESS VERACITY BUT RATHER TO "VILIFY" HIM

Second, Plaintiff Pitt contends that his prior felony conviction was never used to try to impeach "the witness' veracity", but rather [it] was used to vilify him..."[79]

The Defendants argue that although the convictions of Alan Pitt were not used for the express purpose of impeaching him, but rather his ability to be physically present on the Dewsnup property for the period of time he claimed he was continuously crossing the property, the length of time Mr. Pitt took to accurately answer his absences from the community raised issues about his credibility.[80] The Defendants were required to ask several follow up questions before the Plaintiff finally admitted the truth, that he had been absent from the property for a year. Further the fact that Pitt was absent from the property for other periods of time due to his prior convictions, related to his claim of continuous use of the Dewsnup property. It is further submitted that the Plaintiff did not register a timely objection at trial to preserve this issue for appeal.[81]

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[79] Brief of Appellant, at 10.

[80] Tr. at 139, Lines 1-25-140 at Lines 1-12.

[81] Tr. at 139, Lines 1-25-140 at Lines 1-12.

PLAINTIFF'S POSITION THAT AN INCIDENT INVOLVING A FIRE BOMB ON MR. PITT'S CAR, DIRECTLY ADJACENT TO THE HOME OF MARGARET SHIELDS, SHOULD NOT HAVE BEEN REFERENCED

Plaintiff argues that it was error for the Trial Judge to allow the Defendants to question him regarding a car bomb that he acknowledged was thrown at his car next to the home of Margaret Shields, and the acknowledgement by Mr. Pitt that he suspected the bomb was possibly "thrown by the informant that turned him in for drug activity".[82] The Dewsnups maintain that the behavior and perceptions of neighboring landowners is relevant to the prescriptive easement element of acquiescence or lack of objection to the conduct of the plaintiff claiming he or she has routinely used the land. The Defendants contend that the perceived consequences of complaining to the Plaintiff about his use of their land of the adjoining land owner is relevant. The Appellate Court of this state has looked to behavioral explanations for inaction or a lack of complaining regarding boundary lines or the use of property.[83] The fact that the Plaintiff acknowledged that a fire bomb had set his car on fire in the presence of one of the landowners and that he suspected that the informant in his drug case was involved raises the issue about

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[82] Tr. at 139, Lines 1-25-140 at Lines 1-12.

[83] *Carter v. Hanrath*, 885 P. 2d 801 (Utah 1994), certiorari granted 899 P. 2d 1231, reversed

the reasonableness of the perception of Ms. Shields, an elderly neighbor lady, about her fear in expressing her disagreement to Alan Pitt regarding his repeated trips across her land.[84] Defendants maintain that the Plaintiff did not object to this questioning, in a timely manner, to preserve his appeal issue, and he has not shown plain error.[85]

PLAINTIFF'S POSITION THAT THE TRIAL COURT SHOULD NOT HAVE ASKED COUNSEL HOW FAR A NEIGHBOR HAD TO GO TO SHOW THE NEIGHBOR'S OBJECTION TO REPEATED USES OF THE NEIGHBOR'S LAND

The trial judge, after allowing the parties to present and defend a case involving boundary by acquiescence and prescriptive easement for one and one-half days, after reviewing all of the documentary evidence and witness testimony, and after affording the Plaintiff's counsel the opportunity for a closing argument, gave the Plaintiff's counsel an additional opportunity to elaborate and tie in his case theories to evidence that had been presented, very much in the manner of exchanges being appellate judges and counsel for the parties.[86] This was an extra opportunity for the Plaintiff to argue potential holes in his case. The Defendants argue that it is

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[84] Tr. at 139, Lines 1-25-140 at Lines 1-12.

[85] *Pratt v. Nelson*, 164 P. 3d 366, (Utah 2007)

[86] Tr. 345, Lines 23-25-Tr. 346 Lines 1-4.

difficult to see any error or hardship suffered by the Plaintiff on the basis that his counsel was asked questions about his theories and the facts of the case. The Defendants argue that this interaction, described by the Plaintiff, evidences the thoroughness exhibited by the Trial Judge in reaching the correct decision for the parties on the facts presented at trial.

ISSUE THREE

Did the trial court deny the Plaintiff a fair trial and access to an open court when it terminated the examination of the Defendant Robert Taron before Plaintiff's counsel was allowed to ask any questions concerning the actual acreage of the parcels as divided by the fence, about the historical building placement in relation to the boundary verses the fence and to ask questions about previous agricultural use of the Taron land to include the use as an orchard, for the irrigation and production of alfalfa, and the holding and feeding of livestock on the land in years past?

ISSUE FOUR

The Plaintiff identified constitutional provisions set forth in Utah Constitution, Art, Section 11, Open Courts-Redress of Injuries, to support his argument that he was denied his case before a tribunal of this State.

THE PLAINTIFF'S POSITION THAT THE TRIAL JUDGE LIMITED HIS CROSS EXAMINATION OF WITNESS, ROBERT TARON AND THE TRIAL

COURT ERRED IN SETTING AN ARBITRARY TIME CONTSTRAINT DUE TO THE SCHEDULED USE OF THE COURT ROOM BY THE UTAH COURT OF APPEALS

Mr. Pitt argues that the Trial Court errored in dismissing Mr. Taron as a witness, in a manner the Plaintiff labels "arbitrarily" due to "an artificial time constraint created in response to the scheduled use of the court room by the Court of Appeals on April 11, 2008.[87] Mr. Pitt contends that his counsel had many cross examination questions planned for Mr. Taron who he labels as a "very evasive" witness.[88]

Both Counsel were present at pre-trial conferences where the length of time necessary for the trial was discussed. Both Counsel indicated that one to two days time was sufficient to try the case. The Court ultimately granted one and one-half days time for the trial.[89] Defendants argue that both parties were informed by the Judge of the schedule at the close of the first day of the trial.[90] Defendants maintain that the Plaintiff was able to present his case for approximately one -half of the trial, held on April 9 and 10, 2008.

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[87] Tr. 135, Line 12-16.

[88] Brief of Appellant, at 12.

[89] See Minutes of Pre-trials in this case.

[90] Tr. at 135, Lines 12-16.

Mr. Taron was cross examined by the Plaintiff's attorney for approximately thirty-six minutes and he was allowed to ask the Defense Witness approximately 123 questions in this period of time.[91] The claim that the Plaintiff was in essence precluded from calling Mr. Taron as a witness is not supported by the facts from the trial. Furthermore, the claim that Plaintiff's attorney had many well thought out questions he was prepared to ask Witness Taron does not make sense given the facts, questions asked and the use of time for the witness at trial. After the Plaintiff asked approximately 77 questions to Mr. Taron, the Court stated "You know, Mr. Buhler, I think you've made your point here and I don't think that you're going to make any more ground. You both are not going to agree on it so let's move to another topic.[92] The Plaintiff's attorney was allowed to ask approximately 6 more questions before being instructed to move to another topic yet again.[93] After approximately 96 questions, the Court instructed Plaintiff's Attorney that he had five more minutes.[94]

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[91] Tr. at 268 through 292.

[92] Tr. 283, Line 24-Tr. 284, Line 2.

[93] Tr. 285, Line 2-3.

[94] Tr. 287, Line 15-16.

At one point while cross examining Mr. Taron, the Plaintiff's counsel states "Last issue, I guess time wise..."[95] The Plaintiff had plenty of time and opportunity to prioritize his questions in such a way as to get the most necessary information from a Defense Witness within the approximate 123 questions asked. This in no way should be equated with the Plaintiff's claim that he was "effectively precluded" from calling a witness at trial. It is also noteworthy that the Plaintiff did not object after his cross examination was terminated after approximately 123 questions. Defendants not that the Plaintiff did not ask the District Court for more time or request another alternate way such as resuming the trial at the next available time etc.

Defendants argue that to attempt to meet his burden of proof, the Plaintiff called witnesses including Alan Pitt, Robert C. Pitt, and Johnny Pitt. The Plaintiff did not call Mr. Taron as a witness to his client's case but rather chose to cross examine him after the Plaintiff had rested.[96] In addition, the Plaintiff was allowed to cross examine other witnesses including Lowell Shields, Sally Dewsnup, Larry Dewsnup, Rebecca Dewsnup, Robert Taron, Vicky Hildebrand, Michael Taron,

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[95] Tr. 290, Line 13.

[96] Tr. 135, Lines24-25-136, Line 1.

Holly Shields, and Sharon Caldwell.[97] Defendants argue that the Plaintiff's counsel was given a five minute warning to wrap up his cross examination of Mr. Taron, by the Trial Judge prior to the Judge finally asking counsel to cease his questioning of Mr.Taron.[98] Defendants argue that Mr. Pitt's counsel was allowed to ask recross examination questions of Mr. Taron after the Court had turned the questioning over to opposing counsel.[99]

A District Court Judge must be allowed some degree of discretion to ensure that a trial is proceeding in a timely manner in order to allow all parties a fair chance to present their case and defenses within the time constraints set by both Counsel and the Court at previous pretrial conferences. This is exactly what the Court did in this case.

PLAINTIFF'S POSITION THAT THE TRIAL COURT ERRED IN INFORMING A WITNESS THAT THE WITNESS COULD ANSWER "YOU DON'T KNOW "

The Plaintiff contends that the Trial Court erred when it informed a witness that he could answer "you don't know".[100] The Plaintiff notes that Mr. Taron, the witness immediately provided this response. Mr. Taron actually responded "I'm

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[97] Hearing Transcript, Index, and Tr. at 1-365.

[98] Tr. P. 287, lines 15-18

[99] Tr. P. 293, lines 20-25- 294, lines 1 – 6.

[100] Tr. P. 293, lines 20-25-294, lines 1 – 6.

unclear on that one. No, I'm not..." [101] Defendants argue that the transcript reveals that the Trial Court was attempting to ensure the witness gave only answers he knew were correct and not speculate if he did not know the answer to a particular question. This was also done after it was clear that the Plaintiff was not gaining any ground with the Witness. It had also been previously made known to the Court that Mr. Taron was hard of hearing. The Court certainly has the ability to ensure that Witnesses are not abused or intimidated during a trial. The fact that the Trial Judge informed the Witness of the fact that he should not speculate, when faced with intimidation, is not harmful error.

PLAINTIFF'S POSITION THAT THE PLAINTIFF'S RIGHTS AS SET FORTH IN ARTICLE 1, SECTION 11 OF THE UTAH CONSITUTION, ENSURING OPEN COURTS, WAS INFRINGED UPON BY THE DENIAL OF A TRIAL

The Plaintiff identified constitutional provisions set forth in Utah Constitution, Art 1, Section 11, Open Courts-Redress of Injuries, to support his argument that he was denied his case before a tribunal of this State.[102] Defendants argue that the Plaintiff and Defendants were able to call a number of witnesses and they were able to introduce numerous documents in support of their positions. The Plaintiff chose not call Mr. Taron as a witness but was allowed to ask him

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[101] Tr. 293 Lines 21-25-294 Lines 1-6.

[102] Brief of Appellant at 7.

approximately 123 questions on cross examination in addition to the questions he was allowed to ask on re-cross examination. The Plaintiff has presented no persuasive evidence that he was denied an open court or trial in his case. The Plaintiff has presented no supporting argument or case law in support of this position.

CONCLUSION

In its *Lunt* decision earlier this year, this court restated the clear error standard of review for prescriptive easement cases and the clear and convincing standard of proof to be met by plaintiffs at the trial court level.[103] This Court has previously held that prescriptive easement cases are so fact-dependent that trial courts are generally accorded " a broad measure of discretion when applying the correct legal standard to the given set of facts" and are only overturned if the trial court's decision was in excess of this broad discretion.[104] This Court in re R.R.D[105]has held that to qualify as clearly erroneous, a trial court's "findings [must be] either against the clear weight of the evidence or [must] induce a definite and firm

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[103] *Lunt v. Lance,* Case No. 20070014-CA, Court of Appeals of Utah, May 30, 2008.

[104] *Orton v. Carter*, 970 P. 2d 1254, 1256 (Utah 1998) (quoting Valcarce v. Fitzgerald, 961 P. 2d 305, 311 (Utah 1998).

[105] *In re R.R.D*, 791 P. 2d 206, 208 (Utah Ct. App. 1990).

conviction that a mistake has been made."[106]

In regard to boundary by acquiescence cases, the precedent in this state is that a trial court's factual determinations regarding the location of the boundary line and elements of both boundary by acquiescence and boundary by monument are entitled to deference on appeal and will not be reversed absent clear error.[107]

The Plaintiff has not raised any issues or mistakes made by the Trial Court, which were preserved by the Plaintiff, worthy of overturning the Trial Court's Order in this case. The Defendants ask that the Trial Court's Order remain undisturbed for the numerous reasons laid out by the Honorable Mark S. Kouris in this matter.

The Defendant was afforded every opportunity to successfully present his claims and he failed to do so as it relates to Defendant's Taron, Ray and Sally Dewsnup. The Plaintiff should not be awarded a new trial simply because he is unhappy with the outcome as it relates to two of the four neighbors and adjoining land owners he sued. In essence, the Plaintiff is requesting a new trial based upon

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[106] *In re R.R.D*, 791 P. 2d 206, 208 (Utah Ct. App. 1990).

[107] *Saleh v. Farmers Ins. Exch.*, 133 P. 2d 428 (Utah 2007).

the fact that he is unhappy with the findings related to two out of the four different neighbors he sued in this lawsuit.

The Plaintiff asserts that there were volumes of undisputed photographic evidence and testimony from both the Pitts and the Defendant Robert Taron that the old Harris fence had been in place for years and had been recognized by all as the undisputed boundary between the Pitt and Harris (Taron) properties since at least 1952.[108] This statement is not consistent with the photographs produced by the Defendant at trial showing no fence between the properties other than temporary pallets used to coral livestock. The Plaintiff further failed to produce any evidence on the subject of mutual acquiescence between the land owners. The numerous witnesses testifying on behalf of the Defendant made it clear that the issue of the alleged boundary between the properties is not "undisputed" as the Plaintiff believes. Photographs do not speak for themselves and much more was necessary in this case to prove mutual acquiescence.

The Plaintiff agues that he was "vilified" and this had an unfair outcome on the ultimate Ruling by the Court. The fact that he was successful in his claim of boundary by acquiescence against the Browns and his contract claim against the Shields is noticeably absent from the Plaintiff's claim of unfair bias. Furthermore,

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[108] Appellant Brief at 45.

the Court's lengthy Ruling and in depth analysis of the different evidence, including photographs and witnesses makes it clear that the Plaintiff's criminal acts in the past in no way produced an unfair outcome on the Ruling of the Court.

The trial court further did not abuse its discretion as it relates to the Plaintiff's claim of a prescriptive easement over the Dewsnup property. The Plaintiff states that the Court "disregarded unchallenged testimony that the Pitts had openly crossed over the Dewsnup's land for a period of 50 years without anyone taking any physical or legal action whatsoever..."[109] There was ample evidence presented at trial on the subject of action taken by the landowners to prevent the Plaintiff from his unwanted use of their land.

The trial court did not abuse its discretion if it considered Plaintiff's past criminal history in determining his rights to real property. Plaintiff's absence from the property for different periods of time due to incarceration was a key missing element to the Plaintiff's case.

Defendants argue that both parties had equal opportunity during a two day trial, to successfully present their claims. The Plaintiff failed to establish the required evidentiary proof of boundary by acquiescence or prescriptive easement.

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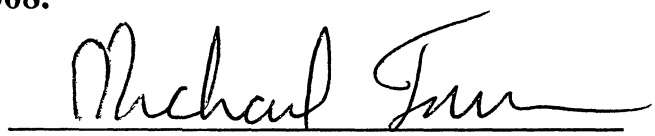
[109] Appellant's brief at 45.

He failed to preserve his objections for appellate review for a number of his arguments. The Defendants respectfully request that the factual findings of decisions in the trial, entered by Judge Mark Kouris not be set aside.

DATED this 14th day of October, 2008.



RICHARD J. TANNER
ATTORNEY FOR DEFENDANTS/APELLEES

CERTIFICATE OF SERVICE

I certify I served by in person service, a true and correct copy of the Amended Petition For Review to the following, this 14th day of October, 2008:

Utah Court of Appeals
450 South State Street
PO Box 140230
Salt Lake City, Utah

and

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